



**Mang'ondi v Action Africa Help International (Petition  
E199 of 2021) [2023] KEELRC 1094 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1094 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E199 OF 2021  
NZIOKI WA MAKAU, J  
APRIL 25, 2023**

**BETWEEN**

**JACOB MANG'ONDI ..... PETITIONER**

**AND**

**ACTION AFRICA HELP INTERNATIONAL ..... RESPONDENT**

**RULING**

1. The Respondent/Applicant seeks
  1. Spent
  2. Spent
  3. This Honourable court be pleased to grant orders for stay of execution pending hearing and determination of the Appeal.
  4. This Honourable court be pleased to order stay of proceedings in this case being the taxation of the bill of costs scheduled for July 5, 2022 pending hearing and determination of this application.
  5. This Honourable court be pleased to order stay of proceedings in this case being the taxation of the bill of costs scheduled for July 5, 2022 pending hearing and determination of the Appeal.
6. Costs of the Application be provided for.
2. The applicant supports the application with a set of grounds on the face of the motion as well as the affidavit of Jacob Githaiga Kamau the Regional Director of the Respondent.



3. The Petitioner/Respondent opposed the motion through his replying affidavit in opposition. The parties consented to dispose the motion by way of written submissions.
4. The Respondent/Applicant submits that the Application is brought under Order 42, Rule 6 of the *Civil Procedure Rules* which specifies the circumstances under which either the trial court or an appellate court may order stay of execution of a decree or order pending appeal. That it has met the conditions required for the stay to be granted as under Rule 6(2) which lays down the conditions which an applicant must satisfy in order to deserve orders for stay of execution pending appeal as follows:
  - a. The court must be satisfied that substantial loss may result to the Applicant unless the order is made.
  - b. The applicant must furnish security such security as the court orders for due performance
  - c. The Application must be made without unreasonable delay.
5. On the condition of “substantial loss”, it submits that it has a meritorious and arguable appeal with high chances of success and is apprehensive that the Petitioner may levy execution against it thus rendering the appeal nugatory. That its arguable appeal is based on the grounds stipulated in the Draft Memorandum of Appeal attached to the Supporting Affidavit and marked as annexure “AB-2” and further grounds that will be presented at the hearing of the appeal thereof. That the Petitioner/Respondent has not furnished this court with any evidence demonstrating his financial standing or his capability to refund the huge decretal sum in the event the Applicant’s Appeal succeeds. That this Court should consider the Petitioner’s averments of having secured gainful employment with World Vision and thus his capability to refund the decretal sum as mere allegations because this does not demonstrate that he can secure the entire decretal sum and pay up all at once. That the Respondent/Applicant, on the other hand, is a non-governmental organisation that largely depends on donor funds to run and operate its affairs and therefore should execution be levied against them, they are likely to suffer a major setback that is far-reaching and a detriment to many more people within the organisation. The Applicant cites the case of *Amal Hauliers Limited v Abdulnasir Abukar Hassan* [2017] eKLR in which the Court noted that the respondent had not disclosed any source of income he would use to refund the applicant the decretal amount should the appeal succeed and found that the applicant had thus established it would suffer substantial loss if the intended execution was not stayed. It is the Applicant’s submission that based on the foregoing, it urges this Court to find that the Applicant has satisfied this condition and thus grant stay of execution.
6. The Respondent/Applicant submits that the Court should also find that the Application herein was brought without unreasonable delay. That the Applicant preferred an appeal at the Employment and Labour Relations Court at Nairobi against the judgment delivered on June 15, 2022, which appeal was filed within the stipulated time. That it also filed without undue delay, an application before the trial court seeking stay of execution pending hearing and determination of the appeal.
7. Regarding the condition of furnishing security for due performance, the Respondent/Applicant submits that it is ready, willing and able to abide by the orders that may be made by this Honourable Court with regard to security. That this is particularly an order to deposit the entire decretal sum in court since it seeks to appeal against the entire Judgment of the Court and the aforementioned will secure the interest of both parties without bias and once the Appeal is determined, the party that wins will have ready access to the decretal sum. On this submission, the Applicant relies on the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR in which the learned Judge was of the view that whereas it is sufficient for the applicant to state that he is ready to provide security



or to propose the kind of security, it is the discretion of the Court to determine the security and the Court then held that since the applicant had offered to provide security, he had satisfied this ground for stay. It is the Respondent/Applicant's submission that as it has duly guaranteed their readiness to furnish security, it is appropriate that they are accorded protection or security by being granted stay of execution pending the hearing and determination of the appeal.

8. The Applicant further submits that as much as the Petitioner/Respondent has a right to enjoy the fruits of his judgment, the Applicant being the aggrieved party has corresponding right to prefer an appeal. It urges this Court, in recognizing the importance of balancing rights, to find that failing to stay the execution pending appeal may render the appeal nugatory.

9. The Petitioner/Respondent on his part submits that a grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the *Civil Procedure Rules*, the relevant part of which states as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

10. The Petitioner submits that it thus follows that an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. As to what substantial loss is, it was observed in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss.

Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in



the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

11. The Petitioner submits that in the instant case it is the Respondent’s case that no substantial loss has been shown to arise once execution proceeds as should be. These are monies decreed as payment for unpaid salaries, leave days balance, pension payment and compensation for wrongful loss of employment His right to fair labour practices by the employer will be infringed upon should the orders prayed for granted. The Petitioner submits that the court, in *RWW v EKW* [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

12. The Petitioner submits that the court is called upon to look at the interests of both parties. From the records annexed in the application, it is undeniable that Judgment was delivered, a decree extracted and taxation of costs is on course. He cited the case of *University of Nairobi v Patrick Mwangi Ngunjiri* {2022} eKLR similarly, this court allowed leave to file appeal out of time but declined to grant stay of execution as it was not merited. The Petitioner submits that the Applicant apart from casually stating, she has totally failed to demonstrate that they will suffer substantial loss if stay of execution is not granted. On the other hand, he submits that we have a former employee who had been dutiful to his employer but was wrongful dismissed and his image published in the local dailies. It is submitted that justice of this case demands that the Petitioner should not be kept at bay from fruits of his judgment. The Petitioner submits that he deponed that post Judgment he secured gainful employment with World Vision International and that consequently he is thus capable of refunding the decretal sum in the unlikely event the appeal succeeds. With regard to security for costs, he submits that the court in *Absalom Dova v Tarbo Transporters* [2013] eKLR, stated:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

13. And that in *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others* [2015] eKLR, it was said:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for



they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6(2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted - which is seldom. The security to be given is measured on that yardstick.”

14. The Petitioner submits that to this end he takes cognizance that the Applicant despite being a huge institution with the financial muscle to offer security has have avoided the issue of security altogether. This is a critical condition which has not been addressed in the application. The Petitioner submits that in *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR, the court observed:

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails. Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... This the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine.”

15. The Petitioner submits that in the unlikely event the court finds merit in the application; it is his prayer that <sup>2</sup>/<sub>3</sub> of the decretal sum be released to the Petitioner while the other <sup>1</sup>/<sub>3</sub> to be deposited in court before they can be heard on their alleged appeal. He submits that to contend that no prejudice will be suffered by the Petitioner is presumptuous and insensitive. The Petitioner urges the court to consider the prejudice likely to be occasioned to the Petitioner/Decree Holder by the delay in releasing terminal dues and damages of Kshs 13,673,641.96 decreed to the petitioner. He cites the case of *University of Nairobi v Mary M Cornelius* [2021] eKLR where Nduma Nderi J directed the applicant to release half the decretal sum to the claimant and to further deposit the other half in a joint interest earning account in the name of the advocates on record as the applicant pursues her appeal. The Petitioner herein thus submits that the Respondent’s application is not merited for having failed to meet all the requirements of Order 46 Rule 6 of the *Civil Procedure Rules* as this application for stay is meant to further stretch litigation for no good cause.
16. The parameters for grant of stay of execution are well settled. In the mind of the Court, the Respondent had a simple three-tier test to meet. It had to make the application timeously, the intended appeal should not be frivolous and that there should be an offer of security. From the depositions and evidence adduced, the Respondent who is the intended appellant before the Court of Appeal has demonstrated that it is willing to deposit security. It has by way of inference suggested that it is a going concern with sufficient resources to meet the decree of the Court. In my view, the parties can secure the stay sought



by way of payment Kshs 3,000,000/- to the Petitioner within 14 days and the deposit of a sum of Kshs 10,000,000/- in an interest earning account in the joint names of the advocates of the Petitioner and the Respondent within 30 days. That will secure the decretal sum and should the Respondent be successful on appeal, the Petitioner would be able to refund the 3 million shillings and the successful party would be able to collect the decretal sum in the interest earning account together with any interest that will have accumulated. Costs of the application to abide the outcome in the Court of Appeal.

17. Failure to comply with the above conditions through the fault and/or commissions and omissions of the Respondent will automatically vacate the stay granted.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF APRIL 2023**

**NZIOKI WA MAKAU**

**JUDGE**

